

MINUTES

MONTANA SENATE 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on February 12, 1999 at 8:00 A.M., in Room 108 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 153, SB 402, SB 403,
2/9/1999
Executive Action: SB 16, SB 243, SB 303, SB 237,
SB 357, SB 363, SB 251

EXECUTIVE ACTION ON SB 243 AND 250

Discussion:

CHAIRMAN GROSFIELD explained that SB 243 and SB 250 were passed out of Committee several days ago but he has not signed the standing committee report. Senate Bill 250 was sponsored by **SEN.**

BARTLETT and repeals the sections of law which were held to be unconstitutional by the Supreme Court. Senate Bill 243 was sponsored by **SEN. THOMAS** and changed the law in response to the same decision. Following executive action there was discussion regarding the purpose section in the Montana Youth Court Act. Amendments - SB024301.avl, **EXHIBIT(jus35a01)** have been drafted to address this issue.

Ms. Lane explained that the amendments address the purpose clause in the Youth Court Act and reinserts the pre-1995 language. The Act was amended in 1995 at the request of **REP. BRAD MOLNAR**. The Court referred to the changes in the purpose clause and held that the purpose of the Youth Court Act had been changed from helping youths to being more retributive. They relied on this change to strike down the Extended Jurisdiction Prosecution Act.

Motion/Vote: **SEN. HALLIGAN** moved to **RECONSIDER THE COMMITTEE'S ACTION ON SB 243**. The motion carried unanimously.

Discussion:

SEN. HALLIGAN explained that it would be necessary to have unanimous support from the Committee to accomplish what is being proposed in the amendments. This was a very strong point for **REP. MOLNAR**. He added that the language that was added was held unconstitutional by the Supreme Court.

SEN. BARTLETT questioned whether the chief proponent of SB 243, **Judge Larson**, was apprized of the amendments. **SEN. HALLIGAN** agreed to review the amendments with him.

SEN. BARTLETT explained that the Court held that as compared to the pre-1995 declaration of purpose, the Act was much more preventative and contained punitive goals. It sought to prevent delinquency through imposition of enforceable and immediate consequences. She added that the purpose section of the act certainly was significant in the Court decision but it was also a strong conviction of **REP. MOLNAR** that his 1995 amendments were a very important element of this Act.

CHAIRMAN GROSFIELD added that it was his understanding that it was held to be unconstitutional.

SEN. BARTLETT clarified that as applied in the Extended Jurisdiction Prosecution Act it was unconstitutional. In and of itself, it may not be unconstitutional.

Motion/Vote: SEN. HALLIGAN moved that SB 243 BE AMENDED. The motion carried unanimously.

Motion/Vote: SEN. HALLIGAN moved that SB 243 DO PASS AMENDED. The motion carried unanimously - 7-0.

EXECUTIVE ACTION ON SB 251

Motion: SEN. HALLIGAN moved that SB 251 BE TABLED.

Discussion:

CHAIRMAN GROSFIELD related that he was disappointed in the hearing. This bill contains several good ideas. The proponents fell apart because they couldn't agree on a word or two. He requested that the table motion be put on hold for awhile.

SEN. HALLIGAN withdrew his motion.

SENATORS DOHERTY and HOLDEN, excused earlier, now present at the meeting.

{Tape : 1; Side : A; Approx. Time Counter : 8.18}

EXECUTIVE ACTION ON SB 16

Ms. Lane explained that the amendments involved two alternatives. The amendment - SB001605.avl, **EXHIBIT(jus35a02)**, is a substitute bill which would provide limited liability for governmental entities only. In the amendment - SB001604.avl, **EXHIBIT(jus35a03)**, Section 1 is identical to Section 1 in the other amendment and then Section 2 is added which is non-governmental limited liability. The hospital issue is covered in Section 1 in both amendments. In (1) it states "(1) Except as provided in subsection (2), a governmental entity . . . or a health care facility, as defined in 50-5-101". This is added to governmental immunity which is immunity and not just limited liability. Subsection (2) of the new Section 1 states that this does not apply to a health care facility if death or bodily injury results from the failure or malfunction.

Motion: SEN. GRIMES moved to AMEND SB 16 - SB001605.avl.

Discussion:

Jeff Brant, Chief of Policy Development, Customer Relations Bureau, Information Services Division, related that they saw that a number of states were looking into addressing the Y2K problem

with legislation in regard to immunity. Some of the changes were not anticipated and go back to 20 years ago. They believe that they should not be required to pay twice for those potential liability problems that may occur.

SEN. BARTLETT questioned how the private sector portions of the bill arose. **Mr. Brant** responded that a number of industry sectors, such as banks and the medical care industries, believed they may be in the same predicament. There has been a growing movement within a number of industry sectors to try to limit the amount of litigation that they may need to face.

SEN. JABS questioned whether all hospitals would be included in this amendment. **Ms. Lane** affirmed that they would.

CHAIRMAN GROSFIELD added that all health care facilities would be included whether they are organized for profit or not.

Vote: The motion carried - 8-1 with **SEN. HALLIGAN** voting no.

Motion: **SEN. GRIMES** moved to **AMEND SB 16 - SB001604.av1 - Section 2.**

SEN. GRIMES remarked that there was very little input from the private sector. Since the cause and effect of this problem is not known, he believed it would not be in the best interest to provide private sector immunity because this may limit their ability to collect damages from each other and/or out-of-state manufacturers.

Ms. Lane explained that Section 1, which has been adopted, applies to government and health care facilities and provides immunity. Section 2 was drafted as limited liability. The damages that can be recovered are limited to contractual damages only. In order to qualify for the limited liability, the entity would have to have taken certain steps in terms of notice, making upgrades, repairs, or fixes available. Also the limited liability does not apply if there is bodily injury. She added "death" because there was a question as to whether or not "death" was bodily injury.

CHAIRMAN GROSFIELD remarked that an effect of Section 2 may be that people may realize that they have only 10 months to take some action.

SEN. HALLIGAN disagreed and believed it had the opposite effect. The lawsuits that have already been filed involve major software companies selling software to insurance companies, banks, financial institutions, or health care institutions with Y2K

problems. Their due diligence involves having been aware of this five years ago. It is important that we do not limit the ability of a business to correct those situations.

SEN. HOLDEN added that he supports establishing guidelines.

SEN. HALLIGAN believed that if there was a problem, the business community would have supported this bill. He added that his sense is that they would like the ability to deal with this on their own. If they felt they had liability that they wouldn't be able to satisfy, they would have participated in the legislation.

SEN. MCNUTT stated that as a part of the business community, they are waiting for their software provider to make their computers Y2K compatible. They have been working on this issue for two years and are claiming that they are doing something. This legislation would give them immunity. As a bank director, he knows that they are liable if the bank is not Y2K compatible. His business needs to be Y2K compatible with the bank. He doesn't want to send out a message that states that if an effort has been made, the software companies are off the hook. Their feet need to be held to the fire.

Vote: The motion failed - 1-8.

SEN. GRIMES questioned whether the title was broad enough to include the private sector community if they wanted to become involved with this issue in the House. **Ms. Lane** explained that the title as amended would be limited to government and health care facilities. It was broad enough at the time it was originally introduced and this is what would be used.

Motion/Vote: **SEN. GRIMES** moved that **SB 16 DO PASS AS AMENDED**. The motion carried 6-3 with **SENATORS DOHERTY, HALLIGAN and BISHOP** voting no.

{Tape : 1; Side : A; Approx. Time Counter : 8.38}

EXECUTIVE ACTION ON SB 237

CHAIRMAN GROSFIELD related that he had discussed this bill with the sponsor, **SEN. WATERMAN**, and she advised him that it would be okay with her if the bill was tabled. If it is tabled, Lewis and Clark County will file a lawsuit. The other jurisdictions across the state are comfortable with the proposal.

Leo Berry, Court Reporters Association, commented that the bill contained many complex issues and carried a large fiscal note. The counties are concerned about the court reporters and how they

interact from an employment standpoint because they work for judges who set their schedules. There has been a commitment from the State Bar Association, which has a judicial section, to participate during the interim to attempt to find a solution to the problem. The court reporters requested that the bill be tabled.

Motion: SEN. HOLDEN moved that **SB 237 BE TABLED.**

SEN. BARTLETT noted for the record that Lewis and Clark County preferred to take the legislative approach. They are in the position of violating the law as things currently stand. If this bill does not pass, they will file a lawsuit to reach resolution of this problem. Their decided preference is to pursue this through legislative rather than court action. She added that Lewis and Clark County had indicated that the bill could be changed by amendment to specify that court reporters are county employees and subject to county personnel policies and procedures. This would satisfy their need and eliminate the fiscal note. She added that none of the possibilities seem to be acceptable to the court reporters.

SEN. DOHERTY added that there are some separation of powers questions involved. The judges need to be able to run their court and schedule their staff while the commissioners pay the bills. The issue of whether court reporters will be independent contractors or not, is only one issue. There are some larger issues involved.

CHAIRMAN GROSFIELD added that it appeared that all the players would be involved in the discussions during the interim.

Vote: The motion carried 7-2 with SENATORS BARTLETT and JABS voting no.

{Tape : 1; Side : A; Approx. Time Counter : 8.44}

EXECUTIVE ACTION ON SB 303

Motion: SEN. BARTLETT moved to **AMEND SB 303 - SB0030302.av1, EXHIBIT(jus35a04).**

Discussion:

SEN. BARTLETT explained that the amendments would make the insurer responsible for covering the attorney fees and costs within the limits that those fees and costs are subjected to under workers' compensation claims when the award is for medical compensation only.

SEN. HOLDEN stated that his understanding of the amendment is that this only addresses repayment of medical bills. This amendment would provide that the trial attorney would be paid for services over and above the medical bills. This payment would be from the workers' compensation insurer.

SEN. BARTLETT clarified that the amendment specifies that the insurer would pay the attorney fees and costs and that this would be in addition to the full amount of medical costs awarded to the injured worker and payable to hospitals and other medical providers. She added that the bill as introduced stated that attorneys could not put a lien on medical payments to hospitals and medical providers. This amendment states that both the medical providers and the attorneys will be paid. The rationale behind this is that it was necessary for the worker to retain the services of an attorney in order to receive the medical benefits. The medical benefits should be paid to the people and facilities that provided the services. The attorney, who in all likelihood is the reason that those benefits will be paid, should also receive the compensation that is permissible under the Workers' Compensation Act and the insurer, who denied the benefits to begin with, should pay both the benefits and the cost of securing those benefits.

SEN. HOLDEN believed the attorney would be negotiating for a lump sum of money over and above the medical benefits.

SEN. BARTLETT stated that that was not addressed in the bill. This only addresses the medical benefits.

Al Smith, Montana Trial Lawyers Association, explained that this only addresses medical benefits. Sometimes there are cases that include compensation benefits. The attorney would take 17% of the compensation package, but this would not come out of the medical benefits. This deals with the situations where the attorney seeks to obtain the medical benefits for an injured worker and there is no contingency fee involved.

SEN. HOLDEN stated that in the issue of a disputed claim, this amendment would change the way we view the claimant, the plaintiff, and the defendant. This states that anyone who wants to hire an attorney can pursue medical benefits and is given an inherent right to recover attorney fees.

Mr. Smith explained that it needed to be proven that the medical benefits should have been paid in the first place. If the insurer agrees that the benefits should have been paid, the worker receives the benefits that he or she was entitled to and there is no attorneys' fee. The attorneys' fee is only provided

when the court agrees that those benefits should have been honored.

SEN. HOLDEN believed it would make more sense for the attorneys to be on equal footing with the hospitals and have their names put on the check. **Mr. Smith** responded that this is current practice. The medical benefit is 69% of the medical provider's usual charge. The attorney and the medical provider are then faced with trying to divide that sum. This is not whole to start with and doesn't adequately provide for the provider. By taking attorneys fees out of that, it makes the situation worse for the provider. This bill puts the responsibility for the payment back on the people who made the denial in the first place. Within 60 days of going to court, the insurer can make those payments and avoid attorney fees altogether.

SEN. HOLDEN raised a concern regarding having the workers' compensation fund paying out more in attorneys fees. The premiums employers pay will need to be increased to make these additional payments. This is a public policy decision. He would be more willing to work with **SEN. BISHOP'S** bill, SB 390, to make it more evenhanded for trial attorneys to recover damages.

SEN. MCNUTT remarked that the testimony revealed that some of these denials did not include a large amount of medical benefits. He didn't see any checks or balances on attorneys fees and would prefer a cap on attorneys fees.

SEN. HALLIGAN remarked that reasonable attorneys fees are tied to the ethical obligations of attorneys and are used very strictly by the court.

SEN. DOHERTY explained that the language states that attorneys fees would be reasonable as established by the workers' compensation court. The bill is submitted to and thoroughly reviewed by the court.

SEN. HOLDEN maintained that insurance companies think in terms of hundreds of dollars while attorneys and judges think in terms of thousands of dollars.

SEN. HALLIGAN remarked that this was referring to personal injury versus an hourly rate. He added that a workers' compensation judge knows what the case is worth and if an attorney would pad a bill, this would be appropriately addressed. He questioned the overriding policy on the bill and whether this legislation was needed.

Steve Browning, Montana Hospital Association, remarked that several days ago an appeal of the workers' compensation decision, which denied the lien by attorneys on medical payments, was argued.

SEN. DOHERTY believed that if the bill was passed without the amendment, the medical providers would not receive these benefits because it was the attorney who saw to it that the benefits were paid. This is the case of people with a common interest fighting over an ever-shrinking pie. It is unfortunate that this legislation needs to be before us. It is brought about by the forces that are shrinking the pie that is available to pay the medical providers. If the lawyer does not become involved, the medical providers will not be paid. He added that **SEN. BARTLETT'S** amendments put the onus back on the person who has caused the problem for the claimant and the hospital in the first place.

Vote: The motion carried with **SEN. HOLDEN** voting no - 8-1.

{Tape : 1; Side : B; Approx. Time Counter : 9.07}

HEARING ON SB 153

Sponsor: **SEN. MIKE HALLIGAN, SD 34, Missoula**

Proponents: **Joe Mazurek, Attorney General**
Dan Whyte, Chief Legal Counsel, Office of the
Secretary of State
John Cadby, Montana Bankers Association
Bob Pyfer, Montana Credit Union League

Opponents: **None**

Opening Statement by Sponsor:

SEN. MIKE HALLIGAN, SD 34, Missoula, introduced SB 153 which revises Article 9 of the UCC to help the business community, in a uniform manner, to purchase, sell, or exchange products all across the nation in a way that is efficient and productive. Article 9 has not been looked at in a comprehensive manner, or changed, since 1972. Senate Bill 153 is intended to bring Article 9, which is widely and regularly used by the business community, up to date in regard to all the electronic filing and other electronic aspects of doing business, such as using the internet, in preparation for the 21st century. Essentially SB 153 takes many of the definitions, etc., spread throughout the code, and puts them into the first 15 or 20 pages.

Proponents' Testimony:

Joe Mazurek, Attorney General, appeared as a Commissioner by appointment of Legislative Services Division to serve as a member of the National Conference of Commissioners on Uniform State Law (The Uniform Conference). He explained that the Uniform Conference is an organization of states formed over 100 years ago. It is a states' rights organization formed primarily to reserve for the states the ability to control laws which apply within their borders, rather than have those functions taken over solely by the federal government. He indicated that the uniform commercial code is the best example of that. Although the U.S. Congress develops the rules governing commerce, the Uniform Conference is an attempt by the states to reserve the ability to protect themselves by participating in the development of these laws.

It is appropriate to have uniform and consistent laws to govern such things as commerce. Montana has adopted the 2nd most uniform act of any state in the country, partially because of the process we go through. When an idea for a law is proposed, it may be brought before the uniform conference which will study the idea, appoint a drafting committee, debate the issue, and ultimately submitted it for a vote by the states. Two thirds of the states must vote for adoption, before it becomes a product. It is submitted to the American Bar Assn. and the American Law Institute for review, and then proposed to the state legislatures for enactment. The UCC governs all business transactions such as sale of goods, banking practices, letters of credit, securities, and secured transactions.

This area deals with the manufacturer who may be financing equipment, a retailer financing their inventory with a loan, and consumer credit for such things as appliances or other consumer goods. All of these types of transactions involve a financing statement, and a lender who takes a security interest in the collateral. Article 9 has often been thought of as the crankshaft of the economic engine of our country.

Many of the issues this legislature is dealing with are efforts to stimulate our state's economy, and it is important to remember that for economic incentives to work, we must have a consistent system of rules for involved parties to use. Senate Bill 153 represents a massive effort by the uniform law conference to update Article 9 of the UCC. There is a comprehensive national effort to get this act adopted and effective by the year 2001.

The act was finalized last fall, and has been brought forward this session so that it can be reviewed by the legislature while

still allowing time to make necessary changes or revisions before the next session.

Attorney General Mazurek handed out fact sheets which explained the bill **EXHIBIT(jus35a05)**, **EXHIBIT(jus35a06)**, and **EXHIBIT(jus35a07)**. Our neighboring states are also introducing the bill this year. He explained that this bill is an attempt to bring Article 9 into our new technology. It's meant to deal with the technology of electronic transactions, and also, because of our growing economy, the increasing volume of transactions. There are many new kinds of collateral that didn't exist before. Deposit accounts and health insurance receivables are examples.

In an attempt to have consistency throughout the states, this bill deals with the way certain products are treated. In Montana and a few other states, agricultural (non-bank) suppliers have been given special treatment. If a mortgage lender finances the on-going operation of a farm or ranch, they not only have a security in the land and buildings, but perhaps in the crops as well. In Montana, there is a provision where someone who sells seed can get a priority lien, even though the bank has a general lien on the property. This bill changes that rule, but is consistent with the overall scheme which is that anyone who has notice of the existence of a lien, by checking the central filing system in the Secretary of States's Office and advances money or product to plant crops or something similar, will take it subject to that under-riding mortgage.

There are two key concepts in the way the lending process works. One is if a banker advances money to a customer to purchase equipment, they enter into a security agreement resulting in a lien being attached to the property. This lien is not good for the rest of the world until it is filed. Article 9 relies on filing of the public record to make that security interest effective and notifying the world that the lending institution has a security interest in that property.

Attorney General Mazurek further pointed out that this is a very complex and lengthy bill. The scope of the article is expanded to include new types of collateral which can be taken by a creditor. This is largely due to changes in our economy and the types of products that are out there. Non-possessory statutory agricultural liens will come under Article 9 for perfection and priority. The way in which perfection (how you security agreement stands up against others) is achieved, is changed slightly in that you now have to protect it by filing in one central location. In Montana and some other states, that is the Secretary of State's Office. Some sates have retained the requirement that you have to file in every county. Usually

lenders will voluntarily file in every county, but it will not be required in Montana.

A lot of transactions cross state lines. Formerly, the state where the collateral was found was the law that applied, but under this new rule, the focus is on the state in which the debtor is located. Often, collateral moves, so now a security interest needs only to be filed in the state where the debtor lives, or the home state of the corporation. This insures the lender that the security interest is in place and valid. He emphasized the full commitment to a central filing system, so that every creditor and every debtor knows they can look to see if there is a security interest on file, and that is the Secretary of State's Office.

One of the difficulties of this process in the past was that there was no provision in Article 9 for protection of the consumer. This has been addressed with a number of consumer protection initiatives in the bill. For example, it provides a consumer the right to redeem merchandise that has been repossessed by the merchant for non-payment, if the consumer makes full payment. A consumer is entitled to know up front that if they default, the amount of the deficiency that would be assessed against them, and how that would be calculated. A secured creditor or lender cannot accept collateral as partial satisfaction. If the merchandise is repossessed, it must be considered as full satisfaction for the consumer obligation. These are certainly modest consumer protection initiatives, but at least Article 9 will have them now.

There are also some requirements in terms of default. If there are a number of lenders who have filed security interests against a business or individual, the first one to file still has the first right to the security, but all other creditors must be made aware that that collateral is no longer available.

Mr. Mazurek emphasized that in the process of drafting these revisions at the national level, it has gone through review by major manufacturing organizations, major lending organizations and consumer organizations. If passed in this session, the law would be available in time to allow transition particularly to the new filing requirements.

Dan Whyte, Chief Legal Counsel, Office of the Secretary of State, explained that their office is the filing office for all financing statements from banks or other lending institutions that are covered under SB 153. This includes agricultural liens, which at one time were filed at the county level.

When the Secretary of State's Office receives a financing statement for filing, they scrutinize it relative to a laundry list of items which must be on that statement such as names of debtors, collateral, and various other information. The trend throughout the nation is for the filing offices to go to an "open drawer" policy, which means if a filing meets minimum requirements, it is accepted, and kept in an "open drawer". The reasons allow for less discretion for rejection by the filing office. These minimum requirements are name of debtor, name of creditor, and description of collateral. If found on the statement, the Secretary of State's office keeps the documents and provides information relative to that to anyone on that statement who wants information. In turning to this type of policy, the Secretary of State's Office is currently building a new UCC financing statement computer system which allows greater capacity for searches and allows more ease of filing by those filing the document and by the Secretary of State's Office. Document imaging is anticipated, as well as internet access to the system in the future.

{Tape : 2; Side : A; Approx. Time Counter : 9.31}

Section 86(2) has additional optional requirements for financing statements which includes address of the creditor, detailed descriptions of collateral, how a debtor should be named, etc.

He referred to amendments proposed by the Secretary of State, **EXHIBIT (jus35a08)**. Amendment 1 requires some additional information for a specific amendment to a financing statement. This would include the name of debtor and creditor.

Amendments 2 thru 4 clarify the distinction between what documents must be rejected under Section 72 and what documents may be rejected under Section 86(2) of this bill.

Amendment 5 considers the state requirements for records management and incorporates Title 2 requirements for records management in this bill.

Amendment 6 discusses what medium the Secretary of State's Office must provide for information requests. They can provide any reasonable form to anyone requesting the same.

Amendment 7 refers to the portion of the current Article 9 that allows the Secretary of State's Office to reject bogus filings. They would like this kept in the statute.

John Cadby, Montana Bankers Association, explained that their counsel has read the document and has concerns with the massive changes incorporated. However, they have two years to educate

lenders across the state before it takes effect in July of 2001. If there are problems, they will be able to address the same before the effective date. He added that Montana was the first state in the nation to adopt centralized filing for agriculture liens.

Bob Pyfer, Montana Credit Union League, related that he reviewed the provisions that apply to consumer lending. It appears that this will fill in some gaps and codify some details. Forms are also provided. He has some questions and does appreciate the July 1, 2001 delayed effective date. He plans to urge their national association to appoint a committee of lawyers and credit union operational personnel to study the new Article 9 from the credit union perspective. If changes are needed, they can be presented at the next legislative session.

Opponents' Testimony: None.

{Tape : 2; Side : A; Approx. Time Counter : 9.40}

Questions from Committee Members and Responses:

SEN. BARTLETT questioned the amount of revenue a centralized filing system for all UCC's would produce. She further questioned what UCC filings were centralized at this point. **Mr. Whyte** responded that currently any financing statement that a creditor would want filed for priority purposes would be filed in their office.

Tanna Gormely, Secretary of State's Office, explained that an agricultural piece of equipment dealing with an irrigation sprinkler system that is fixed to the ground would be filed at the county level and not necessarily with their office.

SEN. BARTLETT asked for a comparison of filings on agricultural collateral between the Secretary of State's Office and the counties. **Ms. Gormely** responded that they have the bulk of the filings.

SEN. BARTLETT further questioned whether there were other UCC filings that must be centrally filed at this time. **Ms. Gormely** explained this would include notices of federal tax liens. There was a provision to have notices of child support liens filed with their office and they do have the commercial UCC liens on file.

SEN. BARTLETT questioned whether the commercial UCC filings were required by law to be at the Secretary of State's Office. **Ms. Gormely** affirmed that they were with the exception of consumer goods and real estate liens and fixture filings that were filed

at the local level. The largest portion of liens would be filings of household items to include refrigerators, stoves, furnishings, etc.

SEN. BARTLETT requested that the Committee be provided the amount of additional revenue that would be provided by centralized filing. **Mr. Whyte** agreed to provide the information.

SEN. BARTLETT questioned the amount of filings being made at the county level now that would change to the state level under this legislation. She raised a concern regarding the revenue that may be lost to the counties. If the amount is insignificant, that is all the information that was needed. She further asked that the information be provided for a variety of counties. When agricultural lien filings were centralized, the revenue lost to counties varied dramatically from county to county. **Robert Throssell, Montana Association of Clerks and Recorders**, agreed to poll the members and provide the information.

SEN. MCNUTT asked if the bill required more centralized filing or whether it simply streamlined the method of filing. **Attorney General Mazurek** responded that any personal property that is fixed to real property requires filing at the local levels. Filing is mostly centralized at the present time but for precautionary reasons duplicate filings are also made locally even though this is not required.

SEN. JABS questioned whether the only official filing would be at the Secretary of State's Office. **Attorney General Mazurek** affirmed. In order to properly effect a security interest in the case of other than fixture filings, the filing would need to be made at the Secretary of State's Office. The duplicate filing at the county level would be notice to other local persons. It would not be required nor would it be valid if this is the only place of filing.

CHAIRMAN GROSFIELD observed that in Section 95 on page 79 there were blank spaces for amounts of fees. He questioned the amount of the fees and also whether there may be CI-75 implications to the fees. **Mr. Whyte** explained that the fees are either required by statute or in administrative rules. He added that the CI-75 bill addressed the fees.

Closing by Sponsor:

SEN. HALLIGAN remarked that with paper giving way to electronic means of filing, it is important to take the major steps toward helping businesses through uniformity. The financial

institutions as well as consumer and business groups will have two years to take a close look at the issues.

{Tape : 2; Side : A; Approx. Time Counter : 10.05}

HEARING ON SB 402 AND SB 403

Sponsor: SEN. BARRY "SPOOK" STANG, SD 36, St. Regis

Proponents: Dorris Novak, Legacy Legislator
Verner Bertelsen, Montana Senior Citizens
Association
Bill Olson, AARP

Opponents: Scott Crichton, American Civil Liberties
Union
Al Smith, Montana Trial Lawyers Association

Opening Statement by Sponsor:

SEN. BARRY "SPOOK" STANG, SD 36, St. Regis, introduced SB 402 and SB 403. He explained that SB 402 is the Article VIII, Section 17, provision which states that this legislation will need to go to the vote of the electorate due to the fee involved.

Senate Bill 403 would require persons who provide in-home health care services which are publicly funded to submit to a criminal history background check. There is a concern that there is no means to check the background of people who have been hired as in-home health care workers in this state. The senior citizens who are provided these services may not be coherent and can become an easy target. He provided a letter from **Lloyd A. Bender, Legacy Legislator, EXHIBIT(jus35a09).**

Proponents' Testimony:

Dorris Novak, Legacy Legislator, remarked that in her area of Thompson Falls, an elderly lady had an in-home health care worker who ended up with her bank account, her home, and everything she owned. She was able to get everything back except the money, which had already been spent. Elderly people are very vulnerable and trust their health care workers. She added that there might be a conflict with the provision for fingerprinting. If it is necessary to delete that provision to pass this bill, she asked that the Committee do so.

Verner Bertelsen, Montana Senior Citizens Association, rose in support of SB 402 and SB 403.

Bill Olson, AARP, related that the safety of individuals makes these background checks necessary.

Opponents' Testimony:

Scott Crichton, American Civil Liberties Union, remarked that there is every reason to make sure that people are protected from workers who are unscrupulous or dishonest. He raised a concern regarding the fingerprinting component of the bill. This is one of three fingerprinting bills to be introduced this session. He questioned what happened to the information received and where the records would reside after the fingerprinting. Today's technology is overwhelming.

Al Smith, Montana Trial Lawyers Association, related that they support employers checking the backgrounds of employees for the most vulnerable population in the state. There are times when MTLA members would sue an employer for not having conducted a background when someone was hurt or lost their money. Their concern involves fingerprinting. Also, in new section 2 (4), the last sentence is not necessary.

Questions from Committee Members and Responses:

CHAIRMAN GROSFIELD asked **Larry Fasbender, Department of Justice**, to comment on the fingerprinting provision and the other two bills introduced this session. **Mr. Fasbender** explained that the Department believes that with the introduced legislation, background and fingerprint checks will increase substantially. Currently they perform approximately 27,000 background checks. About 1% of these come up with criminal records. Some legislation needs to be passed to address background checks.

Currently they perform a name background check for offenses committed in the state. A fingerprint check would go beyond the state. The backlog at the federal level is 4 to 6 weeks. He provided a conceptual amendment, **EXHIBIT(jus35a10)**. The federal government has passed legislation that makes background information available to everyone who deals with children and the elderly on a volunteer basis. There is also legislation regarding the availability of this information for nursing homes. Employers and others interested in doing background checks will have access to this information.

The department is responsible for preparing the record and making sure that it is accurate. A qualified entity is someone who has need of the information in order to determine whether someone is

eligible for employment. This would include nursing homes, schools, the YMCA, Big Brothers and Sisters, etc. They are qualified to receive information as to whether or not someone has been convicted of a crime that would disqualify them for a job. They are currently not eligible to receive the entire record that is produced. In a lot of cases, the record would show that someone was arrested but this would not necessarily show that they were convicted.

Another layer that has been set up is called the authorized entities. This includes state agencies or others who are authorized to receive the information, screen the information, and provide information in the form of a red flag or a green flag. The Department of Health and Human Services and the Office of Public Instruction could be the authorized agencies which would provide the screening.

Senate Bill 403 states that every applicant being considered for employment as a home care worker would need a background check. This should be changed so that once the employer decides to hire someone, the application should be processed for that one applicant. Every applicant that applied would need to have his or her fingerprints taken and agree to have the information made available. The processing would only take place for the one prospective candidate for the job. Since this is a lengthy process, it is necessary that temporary hiring authority be granted until the background check was completed.

This bill does not include fees. The other two pieces of legislation have fees, but use different amounts. Currently it costs them \$32 to run the check. This does not include fingerprinting. House Bill 546 mandates that nursing homes have to go through a fingerprint check. House Bill 590 deals with future certification.

Mike Hanshew, Administrator of the Senior and Long Term Care Division, explained that they are the part of state government that administers the programs that would require a background check under SB 403. They do not have a problem with the amendments presented this morning with exception with amendment no. 4. Their concern is taking on the responsibility of the authorizing agency. If one of their providers were to hire someone, they would take the requested fingerprinted background check and the results would be given to them by the Department of Justice to make a decision about which of the convictions would be of concern regarding this person's employment. Only those convictions would be forwarded to the prospective employer.

SEN. DOHERTY remarked that his understanding is that there is a federal law which needs to be addressed and the funds are not

available. Also, we don't know where the information will end up.

Mr. Fasbender added that there are ways for private entities to be designated as authorized entities and they can set appropriate fees. Employers in the state, in order to avoid liability, will ask that these checks be run. It may take up to a year to receive the information with the present staffing level.

SEN. DOHERTY questioned whether Montana citizen's right to privacy, which affords greater privacy than the Federal Constitution, would mesh with the federal statute.

Mr. Fasbender responded that employment is not a right. As a condition of submitting an application for employment, the individual would agree to have that information made available to the employer.

SEN. BARTLETT questioned whether, under federal law, any employer who may wish to have a background check is authorized to request this information from the Department of Justice. **Mr. Fasbender** affirmed that federal legislation has made the information available to anyone who deals with children or elderly persons. This is in the process of being expanded to include nursing homes and any health care workers.

CHAIRMAN GROSFIELD asked if they would be receiving requests for this information before the next session. **Mr. Fasbender** explained that the Volunteer Children's Act was passed in October of 1998. As more people become aware of this fact, the requests will increase substantially. The nursing home and home health care legislation is pending. Once the legislation is passed, all the entities will have the right to access that information. They are anticipating that the number of requests will double and possibly triple. There are about 8,000 health care workers and the turnover rate is 67%.

CHAIRMAN GROSFIELD asked if the current background checks would be sufficient under federal law. **Mr. Fasbender** explained that the current background check would only show offenses committed in Montana. The federal law provides for a fingerprint check and this would include the entire country.

SEN. BARTLETT questioned whether the federal law addressed what happened to the fingerprints that were submitted to be checked. **Art Penbrook, Department of Justice Information Systems Division**, related that the implementation regulations are pending. Current fingerprint information is returned once the check is completed with the exception of law enforcement officers. They assume this

would remain the same. The information would be returned to the requesting entity.

Closing by Sponsor:

SEN. STANG related that the fingerprinting provision in the bill could be changed. There is a need for this legislation. He asked that the Committee not lose sight of the purpose of the bill.

{Tape : 3; Side : A; Approx. Time Counter : 11:00}

EXECUTIVE ACTION ON SB 303

Steve Browning, Montana Hospital Association, explained that the amendments - SB030301.avl, **EXHIBIT(jus35a11)**, were requested by the Department of Labor. They were inadvertently dropped during editing.

Mark Cadwallader, Department of Labor, remarked that replacing the stricken language would allow the department to continue with its rate setting abilities particularly when there is a merger of two of more hospitals. This provides the methodology for obtaining an appropriate fee schedule.

Motion/Vote: **SEN. BARTLETT** moved that **SB 303 BE AMENDED**. The motion carried unanimously.

Motion: **SEN. HOLDEN** moved that **SB 303 BE AMENDED - EXHIBIT(jus35a12)**.

SEN. HOLDEN remarked that this legislation has become a loser pay situation. In an action there is a defendant and a plaintiff. The earlier amendment would not allow a defendant to receive any compensation if he was right. The only person who would receive compensation under the amendments - SB030302.avl, would be the plaintiff and the attorney. The employer who questions his employee's medical needs and wins in workers' compensation, will never be reimbursed. The employee is paid if he is right. This is a fairness issue. The amendment provides that both parties have an equal protection under the law and will be compensated the fees it cost to defend their position.

SEN. HALLIGAN contended that the injured worker versus the big insurance company is not a level playing field and this is why we do not use the loser pay standard. He added that due to the low rates paid to attorneys, there are very few attorneys who handle workers' compensation cases at this time. **Ms. Butler** agreed that

there are attorneys who no longer take workers' compensation cases. The State Fund sees approximately 400 mediation requests per year and at least 3/4ths of those claimants are represented. Several attorneys only handle workers' compensation cases.

SEN. JABS questioned whether the court costs would go back to the State Fund or to the employer who pays the premium. **SEN. HOLDEN** responded that the insurer steps into the employer's shoes.

SEN. MCNUTT questioned whether this was common practice in any other workers' compensation court actions. If the insurance carrier prevails, are funds paid back by the claimant. **Ms. Butler** stated that in workers' compensation, the current status of the law is that if the insurer wins and the claimant loses, they do not pay the insurer's fees or costs.

SEN. BARTLETT related that SB 390 may be a more appropriate location for pursuing this discussion because it addresses overall attorney fee and cost reimbursements. Senate Bill 303 states that an attorney cannot lien medical payments. There wouldn't be a payment to be liened if the attorney hadn't taken the case and won. The reality is that these are injured workers who are not employed due to their injuries. They are receiving a pre-set wage replacement amount under workers' compensation law. There was testimony in another hearing regarding a Helena citizen who has filed for bankruptcy because he could have received more wage replacement on unemployment insurance than he can under workers' compensation. He is trying to support five children on \$14,000 a year.

SEN. BISHOP added that this is enough of a policy change that it ought to have a separate hearing. He further remarked that this is like an ant going after an elephant. A injured worker can't be compared to an insurance company.

SEN. HALLIGAN questioned whether the amendment would be covered by the title of the bill. **Ms. Lane** believed it would be quite a stretch to include it in the title of the bill.

SEN. HOLDEN insisted that **SEN. BARTLETT'S** earlier amendment was totally different from the intent of the bill. It is not fair to lift one party above another in the courtroom.

SEN. GRIMES commented that he is not unsympathetic to the scenario earlier described about an injured worker but he has seen situations where the employer does everything possible to get the employee back to work.

CHAIRMAN GROSFIELD questioned whether this topic would fit under SB 390. **Ms. Lane** explained that as **Ms. Butler** pointed out it is not current practice for claimants to pay costs and attorneys fees against an insurer when they sue and lose. **SEN. HOLDEN'S** amendment is a 180 degree change in direction on that issue. It doesn't fall into the title of either bill. Senate Bill 390 is an act requiring that an insurer pay costs and attorneys fees for denial or termination of benefits that are later determined compensable.

SEN. HALLIGAN asked whether **SEN. BARTLETT'S** amendment was appropriate under the title of this bill. **Ms. Lane** stated that it might be helpful to have it in the title. It is not a policy change to the extent that **SEN. HOLDEN'S** amendment would be. Under most of Montana law, we do not have a loser pay situation. There is a suggestion that perhaps we should have loser pay in the tort field. This is a policy decision that this legislature has yet to address.

SEN. BARTLETT asked if there was such a bill. **Mr. Smith** clarified that such a bill was introduced by **REP. JAY STOVALL**. It was heard in the House Judiciary Committee and the Montana Defense Trial Lawyers, insurance companies, the MTLA, and the Chamber of Commerce all testified in opposition to the bill.

SEN. BARTLETT stated that without the bill, the attorney can go against the medical benefits that are won in order to be paid the costs and fees.

SEN. GRIMES questioned whether the amendment offered by **SEN. BARTLETT** would cause the State Fund to be less likely to pursue investigating potential fraud or improper claims. **Ms. Butler** believed they were making good decisions now and this should not have a dramatic impact one way or the other.

SEN. MCNUTT stated that the medical benefits that are denied would subsequently be billed to the injured party. The amendment which has been adopted states that if the attorney and plaintiff prevail in workers' compensation court, the hospital will be paid and reasonable attorneys fees will be reimbursed. He questioned where fraud would be involved.

SEN. GRIMES responded that he was concerned with the incentives and disincentives that this would provide.

CHAIRMAN GROSFIELD commented that medical fees were paid at a 69% rate. The attorneys fees are ordinarily 20% or 25% if the case goes to trial. The bill could have raised the percentage to approximately 92%. **Bob Olsen, Montana Hospital Association,**

explained that last session they had a bill that sought one-year floor of 69%. Prior to this legislation, the percentage charge was different for every hospital. The Kalispell Hospital received 50% of their charges. Hospitals in smaller towns received 75% to 80% of their charges. Hospitals give both the State Fund and other insurance companies over \$12 million in discounts. This is a subsidy that goes to the employers who pay the premiums. They settled with the insurance companies at 69% because that limited how much additional money they would need to pay hospitals. The agreement from last session is that they would not increase the percentage. They do not subsidize just the State Fund, but all the workers' compensation charges. He added that some injured workers have health insurance and can afford to pay these charges.

CHAIRMAN GROSFIELD summarized that the bill is a pretty good compromise.

Vote: The motion to amend SB 303, SEN. HOLDEN amendment, failed.

Motion/Vote: SEN. MCNUTT moved that SB 303 DO PASS AS AMENDED. The motion carried with SEN. HOLDEN voting no - 8-1.

EXECUTIVE ACTION ON SB 357

Motion/Vote: SEN. MCNUTT moved to TABLE SB 357. The motion carried with SEN. DOHERTY voting no - 8-1.

EXECUTIVE ACTION ON SB 363

SEN. HALLIGAN remarked that he asked **SEN. ECK** why the moratorium wasn't set at ten years. He believed a repeal would be better than a moratorium because of the associated litigation issues.

CHAIRMAN GROSFIELD believed the only way for the bill to make good sense would be to say that for the period of the moratorium there would be no death penalty and the six inmates on death row would need to have their sentence commuted. This would avoid a tremendous amount of litigation from these six inmates over this issue. Once a moratorium is in place, the chances are that we will never go back to a death penalty.

SEN. DOHERTY stated that he has been provided information that the violent crime rate in North Dakota is substantially less than in Montana. He added that **Ron Waterman's** testimony was very troublesome in that he can point to individuals in extremely similar circumstances of crimes where some individuals are on death row and others are not. The disparity in sentencing is bothersome. National statistics are clear that a poor individual

who does not have a good lawyer or is a racial minority is more likely to receive the death sentence.

SEN. BARTLETT added that there are some problems with the bill but it is a discussion worth having on the floor simply to raise the issue.

SEN. GRIMES commented that he likes the restorative justice concept but a large portion of our penal system is oppositely designed.

SEN. BARTLETT remarked that a discussion on repeal would be a more appropriate ground. If we don't have the public debate, a bill for repeal will go nowhere. The death penalty issue warrants and deserves the discussion. A resolution is a way to begin the process of trying to stimulate that public debate. People need to think about this and not respond reflexively.

Motion/Vote: **SEN. HOLDEN** moved to **TABLE SB 363**. The motion carried with **SENATORS HALLIGAN, BISHOP, BARTLETT** and **GROSFIELD** voting no - 5-4.

MANDATORY DRUG COMMITTEE BILL

Motion/Vote: **SEN. MCNUTT** moved that the **COMMITTEE BILL BE PUT ON HOLD**. The motion carried unanimously.

ADJOURNMENT

Adjournment: 12:00 P.M.

SEN. LORENTS GROSFIELD, Chairman

JUDY KEINTZ, Secretary

LG/JK

EXHIBIT (jus35aad)